To be Argued by:
JAMES V. KEARNEY

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New York Supreme Court

Appellate Division—First Department

GOLDEN GATE YACHT CLUB,

Plaintiff-Respondent,

– against –

SOCIÉTÉ NAUTIQUE DE GENÉVE,

Defendant-Appellant,

– and –

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

BRIEF FOR PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. SNG'S INVECTIVE CANNOT OBSCURE THE SINGLE REAL ISSUE ON THIS APPEAL 1

B. THE ONLY SERIOUS ISSUE IS THE RACE DATE 4

C. RESOLUTION OF THE RACE DATE ISSUE HAS GRAVE CONSEQUENCES FOR COMMERCIAL LAW IN NEW YORK 7

D. THE RESOLUTION OF THE RACE DATE ISSUE 11

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Mercury Bay Boating Club, Inc. v. San Diego Yacht Club,
76 N.Y.2d 256 (1990) 2, 3, 10, 13

Phoenix Four, Inc. v. Albertini,
245 A.D.2d 166, 665 N.Y.S.2d 893 (1st Dep't 1997) 7

Soto v. City of New York,
832 N.Y.S.2d 573 (2d Dep't 2007) 7

Broadwall Amer., Inc. v. Bram Will-El LLC,
821 N.Y.S.2d 190 (lst Dep't 2006) 8

Nobu Next Door, LLC v. Fine Arts Housing,
771 N.Y.S.2d 76 (1st Dep't 2004) 8

OTHER AUTHORITIES

55 N.Y. Jur. 2d *Equity* § 100 (2008) 9

55 N.Y. Jur. 2d *Equity* § 102 (2008) 14

ARGUMENT

A. SNG'S INVECTIVE CANNOT OBSCURE THE SINGLE REAL ISSUE ON THIS APPEAL

There is little new in SNG's reply brief. The opening rhetoric is just a little louder and has even less citation to the record. (SNG R. Br.[1] at 2-8). But, the reply does not dispute the fact that six yacht clubs and racing representatives that were traditional America's Cup challengers publicly questioned the "legitimacy" of CNEV and condemned SNG's Protocol for the next America's Cup. (R.[2] at 680-691). While inveigling against GGYC as a lone spoiler, SNG even fails to mention that a yacht club and its racing team filed an *amici curiae* brief in support of GGYC's positions below, over SNG's objections.[3] (R. at 35; 44-45; 1270). And, it fails to cite any record reference for its assertion that there were a dozen other yacht clubs that agreed to join SNG in the next Cup event, because no such record exists. (SNG R. Br. at 3).[4]

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1 Citations in the form "(SNG R. Br. at __)" refer to SNG's Reply Brief for Defendant-Appellant, dated May 15, 2008.

2 Citations in the form "(R. at __)" refer to the Record on Appeal, submitted by SNG on April 21, 2008.

3 The appendix of the record submitted by SNG does not include the *amici curiae* brief.

4 One racing team that did agree to participate with SNG in the next America's Cup commenced an action in this Court in March, 2008 (which it claims is related to this action) alleging SNG's "breaches of fiduciary duties as trustee" of the America's Cup for having "accepted an invalid challenge from a sham yacht club in order to establish terms for the next America's Cup that grossly benefit defendants at the expense of the trust's beneficiaries . . . ." Complaint ¶¶ 1-3, *Team New Zealand Limited v. Societe Nautique de Geneve*, No. 600662/08

Most tellingly, SNG is flatly wrong in its oft-repeated accusations that GGYC utilized this litigation to exclude all potential competitors and that the motion court's orders have disenfranchised all other competitors. (SNG R. Br. at 2; 3; 4; 6; 8). In its July 11, 2007 challenge, GGYC explicitly stated that it intended to engage with SNG in a mutual consent process under the Deed "toward a Protocol comparable in scope, and similar in terms, to that used for the 32nd America's Cup" (R. at 102), which concluded in early July, 2007, had twelve competitors and was "marked by broad participation among nations and intensely competitive sailing" (SNG R. Br. at 3).

That is what GGYC said it wanted; SNG would not let it be. It was SNG that declined to recognize GGYC as the legitimate challenger after the November 27, 2007 decision. (R. at 1507; 1518). At that time, as the New York Court of Appeals instructed in *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 263 (1990), SNG had the option to "accept the challenge, forfeit the Cup, or negotiate agreeable terms with the challenger." Instead, SNG chose not to accept GGYC as the challenger. (R. at 1507; 1518). It refused to enter into the mutual consent process toward a multi-challenger America's Cup event which GGYC had sought in its July 11, 2007 challenge. Rather, SNG

(N.Y. Sup. Ct. Mar. 6, 2008). Among its allegations is the allegation that SNG "postponed the Cup despite the fact that GGYC offered a settlement proposal to SNG that would have preserved the plans for the 2009 America's Cup race in Valencia. Other challengers, including TNZ, supported this proposal. SNG rejected the proposal." (*Id.* at ¶ 47).

launched into litigation tactics that delayed by six months the issuance of a final order on summary judgment from the November 27, 2007 decision to the May 12, 2008 order.

SNG's actions compelled GGYC and its racing team to prepare for the one-on-one match that is expressly prescribed in the Deed of Gift when a defender abjures a traditional, mutual consent, multiple-challenger event. (R. at 78-79 ¶ 15; 99). The scenario in *Mercury Bay* explains precisely why GGYC was compelled to challenge in a multi-hull. 76 N.Y.2d 256. SNG alleges that "billionaire Larry Ellison, one of the richest men in the world," wanted to build a boat that no one could compete with and therefore challenged in a multi-hull. (SNG R. Br. at 2, n.2). In *Mercury Bay*, the challenger had specified the dimensions of a mono-hull in its notice of challenge and the defender, San Diego Yacht Club, selected a decidedly faster multi-hull. 76 N.Y.2d at 259. To avoid the prospect of repeating that losing scenario, GGYC challenged in a multi-hull thereby protecting itself from being at a similar disadvantage against billionaire Ernest Bertarelli, one of the richest men in the world, and the owner of SNG's racing team "Alinghi."

B. THE ONLY SERIOUS ISSUE IS THE RACE DATE

Stripped of its turgid invective against GGYC (SNG R. Br. at 2-8), SNG's reply brief makes it plain that there is only one real issue remaining for this court to decide: the race date.

CNEV is no longer a contender, if it ever was. SNG's reply does not seriously respond to GGYC's arguments (GGYC Br.[5] at 24-35) or the motion court's rationale regarding CNEV's lack of an annual regatta (R. at 47-49). It is true that the Deed of Gift does not expressly require that the challenger have vessels, members, a website or a telephone number and address. (R. at 98-100). The Deed does, however, require that the challenger be a "Yacht Club." (R. at 98). There is no mystery about what that means. The New York Yacht Club ("NYYC") is a yacht club. (R. at 1410). SNG is a yacht club (R. at 739-741 ¶¶ 3.1-3.2), as is GGYC (R. at 76-77 ¶ 10; 1539). The record below demonstrates what are the hallmarks for these yacht clubs and for yacht clubs in general.[6] It also reflects that

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[5] Citations in the form "(GGYC Br. at __)" refer to GGYC's Brief for Plaintiff-Respondent, dated May 9, 2008.

[6] That record reflects that each has: (i) *members with vessels* (R. at 1339-1345 (NYYC had members in 1844, the year of its founding); R. at 740 ¶ 3.2(e) ("SNG has 3044 members"); R. at 76 ¶ 10 ("GGYC . . . maintains a membership numbering more than 200"); R. at 1339-1345 (photos and descriptions of NYYC vessels); R. at 748 ¶ (d) (SNG "events . . . attract up to 600 competing yachts.")); (ii) *clubhouse* (R. at 1340 ("The NYYC's first clubhouse was built in 1845"); R. at 288 (contact information and address for SNG's "Club-House"); R. at 76 ¶ 9 ("SNG clubhouse in Geneva"); R. at 101 ("Golden Gate Yacht Club[:] #1 Yacht Road, San Francisco, California USA 94123")); (iii) *yachting events* (R. at 1339-1345 (describing numerous NYYC yachting events); R. at 748 ¶ 4.6(d) (SNG "annually holds national and

CNEV does not have them (R. at 41; 1264-1265 ¶¶ 9, 10, 11, 12) and was merely a front for a sailing federation that itself conceded is not a yacht club (R. at 942-943 ¶¶ 56(2)-(4); 1263 ¶¶ 1, 4, 5, 6, 7).[7]

Indeed, any remaining question about the validity of CNEV is put to rest by SNG's reply brief which states that "CNEV has a facility on the water at Base Number 3 on the Interior Dock of the Port at Valencia." (SNG R. Br. at 13). That is the address of the racing team Desafio Español (R. at 1179), which was to be CNEV's America's Cup racing team (R. at 1254). But, as SNG should have been aware when it submitted its reply brief, the Desafio Español racing team had announced, *after* the record on summary judgment closed but *before* SNG submitted its reply brief, that it was no longer CNEV's racing team, but was representing Club Maritimo del Abra, a yacht club in Bilbao, Spain.[8] This, of

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international yacht race events."); R. at 76-77 ("GGYC . . . has an annual regatta . . . among other GGYC regattas.")).

[7] SNG's construction of the Deed of Gift is also exposed as meritless by yet another inconsistency in its arguments. In support of the validity of CNEV's challenge, SNG argues that the challenger need not comply with the requirements of the Deed at the time of the challenge, so long as it seeks to comply by the time of the race. (SNG R. Br. at 9-11). But, when it comes to attacking GGYC's challenge, it argues that a perceived deficiency in the challenge documents at the time of the challenge voids the challenge, resulting in immediate disqualification. (SNG R. Br. at 14-16). In the latter case, there is no thought that the challenger can become Deed-compliant sometime after submitting the challenge documents.

[8] *See* Valencia Sailing, *Desafío Español focuses on TP52 and GP42 campaigns; drops CNEV for Club Maritimo del Abra*, (April 2, 2008) *available at* http://valenciasailing.blogspot.com/2008/04/desafo-espaol-focuses-on-tp52-and-gp42.html (last visited May 18, 2008).

course, would explain why CNEV is not here in court defending its *bona fides* by appealing the order that disqualified it as the challenger of record. CNEV never was a real challenger and it is not now.

Nor does SNG's reply raise any serious question about the motion court's decision (R. at 28-31), or GGYC's arguments (GGYC Br. at 36-45), regarding whether GGYC's challenge certificate ("Certificate") complied with the express terms of the Deed of Gift that required certification of certain dimensions of the challenge vessel (R. at 98). SNG is reduced to the assertion that it has been misled by a Certificate that it concedes contains all the information that the Deed requires. (SNG R. Br. at 14-15). But, on its motion for summary judgment SNG submitted the affidavit of SNG's racing team's General Counsel, which proved that SNG in fact understood from the date of GGYC's challenge that the challenge vessel was a multi-hull.[9] There is more. SNG's claim of confusion over GGYC's Certificate is contradicted even within the four corners of its own reply brief. On the issue of the validity of the Certificate, SNG claims that GGYC's challenge is unclear about its intention to race in a multi-hull. (SNG R. Br. at 14-16). But, on

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[9] The affidavit stated that "[o]n the certificate provided with GGYC's bid, the dimensions of the vessel GGYC proposes to race include a length on load water-line of 90 feet and a beam at load water-line of 90 feet. *These dimensions can only be for a multi-hulled vessel -- presumably, a catamaran.*" (R. at 797 ¶ 36) (emphasis supplied). Shortly after GGYC issued its challenge to SNG on July 11, 2007, SNG's Vice-Commodore Fred Meyer was quoted in a July 24, 2007 press release by SNG's agent, ACM, as saying that GGYC made "demands for a private match race in *catamarans*." (R. at 1876). The record is replete with additional admissions by SNG that it understood that the Certificate describes a multihull. (R. at 26; 1022; 1025).

page 2 of SNG's Reply, when SNG, with its billionaire, Ernesto Bertarelli, is criticizing GGYC's billionaire, Larry Ellison, SNG professes to have known full-well that GGYC's "challenge . . . specifies a boat that is so large" that others could not compete against "the *catamaran* goliath in which GGYC proposes to compete." (SNG R. Br. at 2, n.2) (emphasis supplied).[10]

C. RESOLUTION OF THE RACE DATE ISSUE HAS GRAVE CONSEQUENCES FOR COMMERCIAL LAW IN NEW YORK

There is only a single serious issue remaining on this appeal -- the selection of race dates. The significance of this issue goes well beyond billionaires and boats. Its resolution has grave consequences for the development of commercial law in New York. The question is whether a litigant's uncertainty over the outcome of litigation alone provides a court, in the exercise of its equity authority, sufficient grounds to alter the terms of a trust instrument or contract.

Neither the motion court in any of its decisions, nor SNG in its multiple briefs, has referred to a single case where a court has held that the wrongdoer, the party that breached the trust instrument or contract, necessitating

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[10] The lower court's denial of SNG's motion rearguing the validity of GGYC's certificate should be affirmed for a separate reason. Whether brought on by motion or order to show cause, it should have been denied as it violated the well-established rule against "successive fragmentary attacks upon a cause of action . . . [Movant] must assert all available grounds when moving for summary judgment." *Phoenix Four, Inc. v. Albertini,* 245 A.D.2d 166, 167, 665 N.Y.S.2d 893, 893 (1st Dep't 1997) *see also Soto v. City of New York,* 832 N.Y.S.2d 573, 574 (2d Dep't 2007).

the litigation, is entitled to an equitable modification of a contractually imposed time period merely because the litigation created uncertainty. Under New York case law, the equitable relief of tolling a contractually imposed time period is only available to benefit the wronged party, here GGYC, not to alter the instrument's terms to benefit the party that breached those terms, here SNG. *See, e.g., Broadwall Amer., Inc. v. Bram Will-El LLC,* 821 N.Y.S.2d 190, 193 (lst Dep't 2006); *Nobu Next Door, LLC v. Fine Arts Housing,* 771 N.Y.S.2d 76 (1st Dep't 2004). SNG's reply brief does not distinguish this precedent, it simply ignores it, preferring invective over analysis.

Why is this an important case for the development of New York commercial law? Here, SNG submitted no evidence below that it was, in fact, prejudiced by its claimed "uncertainty" over the outcome of the litigation. Specifically, there is no evidence that SNG's racing team was not in fact preparing for the one-on-one race with GGYC promptly after the initial declaration on November 27, 2007 that GGYC's challenge was valid. To the contrary, the record reflects that SNG began preparation for a race in multi-hull vessels shortly after the November 27, 2007 decision.[11]

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[11] Grant Simmer, Managing Director and Design Coordinator for SNG's racing team, Alinghi, stated, "We only started working on the design of a multihull *in the middle of December.*" (R. at 3159-3160, n.5) (emphasis supplied). And in the declaration of Nigel Antony Irens, dated January 28, 2008, submitted by SNG, Mr. Irens states that he is "currently retained

A rule of law that allows for tolling of a contractually imposed time period solely on the basis of "uncertainty" over the outcome of litigation would lead to unimaginable, absurd and unpredictable results in a vast array of commercial transactions. In a legal world where uncertainty regarding the outcome of litigation, without more, could threaten the enforceability of contract provisions, options in innumerable business contexts that depend on the enforcement of prescribed time periods would be rendered practically unenforceable, as would time periods in trust indentures, as well as performance and delivery time deadlines in commercial contracts. Anyone who wants more time to perform a legal obligation need only find a reason to breach a legal duty and thus compel litigation to get more time to perform. That is what SNG asks this Court to rule. It is not permitted because of the deeply rooted principle of equity, recognized in New York law, that one claiming equitable relief will not be permitted to take advantage of his own wrong. *See, e.g.,* 55 N.Y. Jur. 2d *Equity* § 100 (2008). This rule would be eviscerated if SNG were granted the benefit of an extension of the 10-month period where it breached the terms of the Deed and it extended the litigation another six months after the November 27, 2007 summary judgment decision.

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by Team Alinghi *as a design consultant with respect to the design of a defending yacht*" and that "[t]he majority of [his] work has been in the field of the design of racing multi-hulled sailing yachts." (R. at 2852 ¶¶ 1-2) (emphasis supplied).

Still another consequence of SNG's novel rule of law is that it does not provide for consideration of the inequity that it would impose on the party who has been wronged by the breach and has prevailed in the litigation. In directing the race to proceed in March, 2009 (SR.[12] at 15-16), the motion court ignored the fundamental unfairness of that ruling on GGYC, which has done nothing wrong. The Court of Appeals decision in *Mercury Bay* recognized "the deed makes clear that the design and construction of the yachts as well as the races, are part of the competition contemplated." 76 N.Y.2d at 269. The Deed entitles the challenger to limit the defender's preparation time to 10 months. (R. at 98). Extending the defender's time to explore different designs before construction, to have more time for such construction, and to have more time for development of the vessel post-construction, is unfair to a challenger who proceeds on the basis that it must get all design, construction and practice sailing completed in 10 months. If given 21 months,[13] instead of the mandated 10 months, the defender also gains the advantage of additional time which may allow it to design and construct more than one vessel since it is not required to designate its competing vessel until the start of the first race. (R. at 99). Moreover, if GGYC, and its racing team, had known that it would have 16 months from the November 27, 2007 decision (rather than the

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[12] Citations in the form "(SR. at __)" refer to the Supplemental Record on Appeal, dated May 15, 2008.

[13] Over 21 months will elapse between the time GGYC issued its challenge on July 11, 2007 (R. at 101) and the race dates ordered in the May 12, 2008 order (SR. at 15-16).

prescribed 10 months) to design, build and train on its challenge vessel, it would have likely had a different design and construction strategy which would have resulted in a more powerful, faster yacht for the races. This inequity cannot be rectified by giving GGYC more time because of the irrevocable design and planning choices it made to comply with the 10-month period beginning November 27, 2007.

D. THE RESOLUTION OF THE RACE DATE ISSUE

To preserve the well-established and commercially practicable precedent discussed above, and to put GGYC in the position it would have been in were there no SNG breach of the terms of the Deed, the motion court should have tolled the 10-month preparation period for the 4 months from the commencement of the litigation to the November 27, 2007 decision. This would mean a race date in October, 2008. Equity requires that GGYC at that juncture be put in the same position it would have been in were its challenge accepted in July, 2007. Equity requires that GGYC be given 10 months to prepare, and its right to limit SNG to 10 months' preparation be enforced. Thus, the race date should be set in October, 2008, as GGYC requested in the Rule 202.48(c) settle order process. (R. at 1415-1421; 1479-1485). As described above (*supra* at 8), New York law permits tolling only for the benefit of GGYC, and only for that period of time.

After the court's March 17, 2008 decision and order, reaffirming the validity of GGYC's challenge, SNG conceded that the 10-month period should begin to run as of March 19, 2008, when the March 17 order was entered. (R. at 3139) (SR. at 10). That would put the race in January, 2009. The motion court's order of May 12, 2008 put the race 10 months from when the entry of that order was served, which would mean March, 2009. (SR. at 15-16).

There is no justification for the expansion of SNG's Deed-limited time for preparation from November 27, 2007 to March 17, 2008 or in turn for the 2-month period from March 17, 2008 to May 12, 2008. (SR. at 9-16). Further delay cannot be justified on the ground, proffered by the motion court, that SNG's motions were not frivolous. (SR. at 10). Nor can it be justified on the ground that the November 27, 2007 decision was not reduced to an order until six months later. (SR. at 12-16). It was SNG's disruption of the Rule 202.48(c) settle order process and its motion to reargue that caused that delay. Further, if the settlement of an order triggers the end of the "uncertainty," (as the motion court holds), the order entered on March 19, 2008 implementing the March 17, 2008 decision, declaring GGYC's challenge valid, should have started the 10 month time clock, resulting in race dates in January, 2009.

SNG's apparent thirst for more time than the Deed permits is only constrained by the ever-evolving imagination of its lawyers. Although SNG stated on the record below that it would not appeal if the court ordered a race date in May, 2009 (R. at 3137, n.1), it now seeks a tolling running through the completion of all appeals. (SNG R. Br. at Section IV(A)). This vividly illustrates the error in SNG's logic and the motion court's decision on the race dates. A litigant found to have breached the terms of a contract or trust instrument, like SNG, could indefinitely extend contractually imposed time periods by creating disputed issues and litigating them in series. SNG did it in this case when it advanced new arguments after the close of its summary judgment motion. This could go on and on.[14] In *Mercury Bay*, the court would not permit this. 76 N.Y.2d at 264. It required the competitors to proceed with the race and then adjudicate the remaining dispute. (*Id.*).

SNG's other argument to expand the tolling period beyond the motion court's May 12, 2008 ruling cannot be taken seriously. After SNG petitions the motion court to modify the terms of the Deed so as to toll the 10-month period of time to advantage SNG, it now claims on appeal that the court cannot direct the race to occur in Valencia, Spain because the Deed mandates a Southern

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[14] This prospect is not fanciful; a harbinger of it can be found at page 14 of SNG's reply, where it levels a new claim, not litigated below, of an alleged deficiency in GGYC's challenge regarding the Deed of Gift requirement of a custom-house registry.

Hemisphere location for races occurring from November 1 to May 1. If, in equity, the court can modify one provision of the trust instrument to effect equitable relief (we believe not available here for SNG), it logically follows that it can modify another to effectuate the perceived equitable relief. SNG cannot object to this since it seeks equity and "one who seeks equity must do equity." 55 N.Y. Jur. 2d *Equity* § 102 (2008).

Finally, if there is any concern as to whether the court has the equitable authority to modify the Deed of Gift to direct a race in March, 2009 in the Northern Hemisphere, then the only resolution is not to give SNG more time to prepare, but to set the race date for October, 2008. That is 10 months from the court's declaration of GGYC's right to be challenger in the November 27, 2007 decision, and is a time when the Deed permits a Northern Hemisphere location.[15]

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[15] SNG claims that "GGYC specifically designated a race in the Northern Hemisphere." (SNG R. Br. at 20). In fact, GGYC did not. As discussed more fully in GGYC's main brief, (GGYC Br. at 49-50), GGYC merely recognized that the Deed mandates that a race in July would occur in the Northern Hemisphere. (*Id.*). Equally specious is SNG's reference to a purported stipulation to extend the race dates, which SNG concedes "was never fully executed and filed with the trial court." (SNG R. Br. at 20, n.9).

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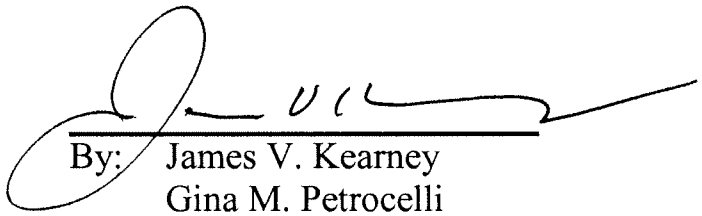

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